Supreme Court, U.S.
FILED

961575 APR 3 1997

OFFICE OF THE CLERK

No.

In The

Supreme Court of the United States

October Term, 1996

H. FRANCIS deLONE, JR.,

Petitioner,

vs.

FRANK MORRIS, JAMES ORMAN, PAUL STANLEY, ROBERT KURTZ, WILLIAM SAMMARTINO, THE CITY OF PHILADELPHIA, UNKNOWN INDIVIDUALS WHO CONSPIRED WITH THE NAMED DEFENDANTS TO DEPRIVE PLAINTIFF OF CONSTITUTIONAL RIGHTS and JAMES RUSEK,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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38 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether a district court has subject-matter jurisdiction to issue a Rule 11 sanctions order more than eight years after suit was started and almost seven years after the conclusion of the trial.

2. Whether Rule 11 may properly be used to punish a lawyer who, after a thorough investigation, filed an action he believed to be appropriate, but then failed to "let go" after the litigation was in midstream, and questions allegedly existed about the factual bases for the suit.

LIST OF PARTIES BELOW

The Judgment Order of the Court of Appeals (3a-4a) lists the names of all persons and entities who were parties in the trial court, and the caption of this Petition also lists the names of all such parties.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
List of Parties Below	ii
Table of Contents	iii
Table of Citations	iv
Introduction	1
Opinions Below	2
Statement of Jurisdiction	2
Rule Involved	3
Statement of the Case	7
Reasons for Granting the Writ	10
I. This Court Should Allow A Writ Of Certiorari to Settle The Important Question Of Whether, More Than Eight Years After The Start Of A Suit And Almost Seven Years After The Trial On The Merits, A District Court Still Has Subject-Matter Jurisdiction To Impose Rule 11 Sanctions.	10
II. This Court Should Grant Certiorari To Resolve The Conflict Among The United States Courts Of Appeals On The Question of Whether Rule 11 Imposes An Obligation On Counsel At The Time	

Contents

Page

That Papers Are Filed Or Instead Imposes A Continuing Duty On Counsel To Amend Previous Pleadings. 12

Conclusion 16

TABLE OF CITATIONS

Cases Cited:

Business Guides v. Chromatic Communications, Inc., 498 U.S. 533 (1991) 13, 14

Corp. of the Presiding Bishop v. Assoc. Contractors, 877 F.2d 938 (11th Cir. 1989) 12

Gaiardo v. Ethyl Corp., 835 F.2d 479 (3d Cir. 1987) . 14

Kokkonen v. Guardian Life Ins. Co. of America, __ U.S. __, 114 S. Ct. 1673 (1994) 10

Statutes Cited:

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1927 11

42 U.S.C. § 1983 ..... 1, 7

Contents

Page

Rules Cited:

Federal Rules of Civil Procedure 11 ..... i, 1, 2, 3, 8, 10, 11, 12, 15

Federal Rules of Civil Procedure 11(b)(2) 8

Federal Rules of Civil Procedure 54(d) 10

Supreme Court Rule 10 16

Other Authority Cited:

Steven B. Burbank, *Rule 11 in Transition: The Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 11* (American Judicature Society, 1989) 11

APPENDIX

Appendix A — Order Denying Petition for Rehearing of the United States Court of Appeals for the Third Circuit Dated January 3, 1997 ..... 1a

Appendix B — Judgment Order of the United States Court of Appeals for the Third Circuit Dated December 4, 1996 ..... 3a

Appendix C — Order of the United States District Court for the Eastern District of Pennsylvania Dated January 19, 1996 ..... 6a

Contents

Page

Appendix D — Order of the United States District Court for the Eastern District of Pennsylvania Dated January 12, 1996 ..... 8a

Appendix E — Excerpts of Plaintiff's Memorandum in Opposition to Motion of Defendant Robert Kurtz to Dismiss Plaintiff's Complaint 12a

INTRODUCTION

In the notes to the 1983 Amendment to Rule 11 of the Federal Rules of Civil Procedure ("Rule 11"), the Advisory Committee states:

> The Rule is not intended to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories. The court is expected to avoid using the wisdom of hindsight and should test the signer's conduct by inquiring what was reasonable to believe at the time the pleading, motion, or other paper was submitted.

Almost seven years after the conclusion of the trial in this § 1983 case, the district court issued an order imposing Rule 11 sanctions of over $85,000 against the plaintiff, Frank Morris, and H. Francis deLone, Jr., Mr. Morris's attorney. On appeal, the Court of Appeals noted that "plaintiff's counsel made an extremely thorough investigation", and that "this is a civil rights case, in which counsel obviously thought a § 1983 action was appropriate to vindicate what appeared to him to be an excessive and unwarranted criminal investigation arising out of a bizarre set of facts." (4a). Then, after mentioning the deferential standard of review, the Court stated that "Rule 11 is designed in part to deal with infractions by able, public-spirited but overzealous counsel, and that, when it becomes clear, after litigation is in midstream, that a complaint is not reasonably grounded in the facts, counsel must then 'let go.' " (4a). If Rule 11 may be used several years after the end of a case to impose punishment on a zealous counsel who refused to "let go," then the Rule will have a chilling effect on attorneys' enthusiasm in representing § 1983 clients. In such circumstances, the losers would not be limited to lawyers who represent clients in civil rights cases but would

also include individuals in our society who are least able to confront the powerful forces of government and who rely on lawyers to safeguard their-and ultimately our-civil liberties.

OPINIONS BELOW

The unreported Order of the District Court, imposing Rule 11 sanctions on Petitioner and his client, appears in the Appendix at pages 8a-11a. The Order of the District Court amending its original sanctions order appears at pages 6a-7a of the Appendix.

The Judgment Order of the Court of Appeals, which was entered on December 4, 1996, appears at pages 3a-5a of the Appendix.

The Order of the Court of Appeals denying a Petition for Rehearing, which was entered on January 3, 1997, appears at pages 1a-2a of the Appendix.

STATEMENT OF JURISDICTION

The Judgment Order of the United States Court of Appeals for the Third Circuit, affirming the district court's Order imposing Rule 11 sanctions on petitioner, was entered on December 4, 1996.

The Appellate Court's Order denying a petition for rehearing was entered on January 3, 1997.

This Court has jurisdiction to review this final decision of the United States Court of Appeals for the Third Circuit pursuant to 28 U.S.C. § 1254(1).

RULE INVOLVED

Rule 11 of the Federal Rules of Civil Procedure provides:

> **(a) Signature.** Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer's address and telephone number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.
>
> **(b) Representation to Court.** By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,—
>
> > **(1)** it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) **Sanctions.** If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violations.

(1) **How Initiated.**

(A) **By Motion.** A motion for sanctions under this rule shall be made

separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(B) On Court's Initiative. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(2) Nature of Sanction; Limitations. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition

of such conduct or comparable conduct by others similarly situated. Subject to the limitation in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(3) Order. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

> **(d) Inapplicability to Discovery.** Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37.

STATEMENT OF THE CASE

In August of 1987, petitioner filed this § 1983 case on behalf of plaintiff, Frank Morris. In April of 1989, the jury trial in this case was completed.

In January of 1996, almost seven years after the April of 1989 date when the jury trial concluded and more than eight years after the August of 1987 date when the action was commenced, the District Court issued an Order imposing Rule 11 sanctions of over $85,000 against plaintiff and his counsel. (8a-11a).

Explaining why it issued the Order, the District Court stated:

> I impose Rule 11 sanctions on plaintiff for two reasons. First, the doctrine of absolute witness immunity barred any claim against Kurtz for giving allegedly perjured testimony. *Briscoe v. LaHue*, 460 U.S. 325, 330-31 (1983). . . .

(9a).

This reasoning was very surprising since, more than eight years earlier plaintiff had conceded that Kurtz was immune from liability under § 1983 for giving perjured testimony at plaintiff's criminal trial. In Plaintiff's Memorandum in Opposition to the

Motion of Defendant Robert Kurtz to Dismiss Plaintiff's Complaint, which was filed in October of 1987, plaintiff stated:

> Although Kurtz describes the scope of its holding too broadly, *Briscoe v. LaHue*, 460 U.S. 325, 103 S.Ct. 1108 (1983) does require the conclusion that Kurtz is immune from liability under § 1983 for his own presentation of perjured testimony at plaintiff's criminal trial.

(13a) (footnote omitted).

The District Court also claimed that plaintiff had failed to provide factual evidence linking Kurtz to the conspiracy described in the complaint. (9a). With respect to other defendants, the District Court again erroneously assumed that plaintiff was asserting perjury claims against the defendants for their own presentation of perjured testimony and, on the basis of this erroneous assumption, concluded that plaintiff had violated Rule 11(b)(2). (10a). The court also stated:

> Plaintiff also violated Rule 11(b)(3), because he failed to conduct a reasonable inquiry to certain facts upon which to support his conspiracy claims against these defendants.

(10a).

Conspicuously absent from the court's discussion of Rule 11 sanctions was any claim that plaintiff or his attorney had signed any specific document in violation of Rule 11.

In a Judgment Order, the United States Court of Appeals affirmed the District Court's Order. The Court of Appeals did

not even discuss the question of whether the District Court had the power to issue a sanctions order seven years after the fact. The Court, however, did provide a brief discussion of its reasoning in footnote 1 to the Judgment Order. There, the Court wrote:

> Judge Becker joins in the judgment, albeit with uneasiness because he believes that the order of sanctions was unwise. Judge Becker particularly notes that the learned District Judge himself acknowledged that the second amended complaint was extremely close to passing muster (*i.e.*, that it was "close to the line"). He also makes two other points. First, plaintiff's counsel did not simply "dash off" this complaint, as is often the case with sanctionable pleadings; indeed, it is undisputed that plaintiff's counsel made an extremely thorough investigation. Second, this is a civil rights case, in which counsel obviously thought that a § 1983 action was appropriate to vindicate what appeared to him to be an excessive and unwarranted criminal investigation arising out of a bizarre set of facts. Ordinarily such types of law suits are favored. However, given the deferential standard of review, Judge Becker cannot write that the district court abused its discretion. He acknowledges in this regard that Rule 11 is designed in part to deal with infractions by able, public-spirited but overzealous counsel, and that, when it becomes clear, after litigation is in midstream, that a complaint is not reasonably grounded in the facts, counsel must then "let go."

(4a).

In its discussion, the Court of Appeals also failed to identify any specific document that plaintiff's counsel had supposedly signed in violation of the dictates of Rule 11.

Following the issuance of the Judgment Order affirming the District Court's belated sanctions Order, the Court of Appeals denied a petition for rehearing. This Petition for a Writ of Certiorari followed.

REASONS FOR GRANTING THE WRIT

I.

THIS COURT SHOULD ALLOW A WRIT OF CERTIORARI TO SETTLE THE IMPORTANT QUESTION OF WHETHER, MORE THAN EIGHT YEARS AFTER THE START OF A SUIT AND ALMOST SEVEN YEARS AFTER THE TRIAL ON THE MERITS, A DISTRICT COURT STILL HAS SUBJECT-MATTER JURISDICTION TO IMPOSE RULE 11 SANCTIONS.

In *Kokkonen v. Guardian Life Ins. Co. of America*, __ U.S. __, 114 S. Ct. 1673 (1994), this Court held that the District Court lacked subject-matter jurisdiction to enter an order enforcing a settlement agreement. In *Kokkonen*, the settlement agreement was reached on April 13, and the motion seeking enforcement of the agreement was filed slightly more than a month later, on May 21. 114 S. Ct., at 1675.

This Court's holding in *Kokkonen* raises serious questions about whether a District Court has subject-matter jurisdiction to issue a Rule 11 sanctions order over eight years after the initiation of a case and almost seven years after the case had been tried on the merits. The Advisory Committee Comments to the 1993 Amendments to Subdivision (d) of Rule 54 of the

Federal Rules of Civil Procedure demonstrate one reason for the grave concern about such a belated exercise of subject-matter jurisdiction. In the comments, the Advisory Committee notes: "Prompt filing [of a fee petition] affords an opportunity for the court to resolve fee disputes shortly after trial, while the services performed are freshly in mind." Although the fourteen day deadline established by Subdivision d is not applicable to motions for sanctions under the rules of procedure or under 28 U.S.C. § 1927, there is good reason to have concern about a court having facts freshly in mind when it issues orders imposing such sanctions. For example, in this case, even though plaintiff had long ago conceded that he was not attempting to impose liability on defendant Kurtz for Kurtz's own presentation of perjured testimony, the District Court stated that the first reason it was imposing Rule 11 sanctions on plaintiff was that the "doctrine of absolute witness immunity barred any claim against Kurtz for giving allegedly perjured testimony." (9a). Further, although the Court of Appeals stated that "it is undisputed that plaintiff's counsel made an extremely thorough investigation." (4a). The District Court stated that "plaintiff violated Rule 11(b)(3), because he failed to conduct a reasonable inquiry to ascertain facts. . . ." (10a).

Concern about belated sanctions orders is an especially serious matter in civil rights actions, such as this one. Such actions have traditionally involved a "considerably higher" risk of Rule 11 sanctions than other types of action. Steven B. Burbank, *Rule 11 in Transition: The Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 11* (American Judicature Society, 1989), at 69. The combination of this high risk coupled with a risk of belated decisions based on inaccurate recollections of events would, contrary to the purpose of Rule 11, chill the enthusiasm of attorneys who have chosen to represent individuals who have been denied their constitutional rights. Such a result, of course, would be totally contrary to

fee-shifting statutes that have been enacted to encourage attorneys to represent such people.

II.

THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE CONFLICT AMONG THE UNITED STATES COURTS OF APPEALS ON THE QUESTION OF WHETHER RULE 11 IMPOSES AN OBLIGATION ON COUNSEL AT THE TIME THAT PAPERS ARE FILED OR INSTEAD IMPOSES A CONTINUING DUTY ON COUNSEL TO AMEND PREVIOUS PLEADINGS.

In *Corp. of the Presiding Bishop v. Assoc. Contractors*, 877 F.2d 938, 942-43 (11th Cir. 1989), the Eleventh Circuit Court of Appeals noted:

> The circuit courts of appeals appear to differ on whether Rule 11 imposes a continuing duty on counsel to amend previous pleadings when their factual or legal basis dissolves. *Compare Thomas v. Capital Security Services*, 836 F.2d 866, 874 (5th Cir. 1988) (in banc) (disagreeing with "earlier decisions by this Court that impose upon an attorney a continuing obligation under Rule 11. Instead, we believe that a construction of Rule 11 which evaluates an attorney's conduct at the time a 'pleading, motion, or other paper' is signed is consistent with the intent of the rulemakers and the plain meaning of the language contained in the rule."); *Gaiardo v. Ethyl Corp.*, 835 F.2d 479, 484 (3d Cir. 1987); *Hamer v. County of Lake*, 819 F.2d 1362, 1370 n.15 (7th Cir. 1987);

> and *Oliveri v. Thompson*, 803 F.2d 1265, 1274 (2d Cir. 1986), *cert. denied*, 480 U.S. 918, 107 S. Ct. 1373, 94 L.Ed.2d 689 (1987) *with Herron v. Jupiter Transporation Co.*, 858 F.2d 332, 336 (6th Cir. 1988) (agreeing with cases that imposed a continuing obligation); *Flip Side Production v. JAM Productions*, 843 F.2d 1024, 1036 (7th Cir. 1988) (holding without discussion that "[a]t the close of discovery, . . . [plaintiff] was obligated [by Rule 11] to dismiss [defendant] or suffer the consequences"); *and Lane v. Sotheby Parke Bernet, Inc.*, 758 F.2d 71, 73 (2d Cir. 1985) (holding without discussion of Rule 11 cases that in assessing Rule 11 sanctions, district court should consider "whether appellant should have continued this action after completion of discovery").

This split in the circuits was also recognized by Justice Kennedy in his dissenting opinion in *Business Guides v. Chromatic Communications, Inc.*, 498 U.S. 533 (1991). Justices Marshall and Stevens joined in Justice Kennedy's dissent, and Justice Scalia joined in parts of it. In his dissent, Justice Kennedy observed:

> It might be argued that the attorney's signature on the original filings created a continuing duty to conduct reasonable inquiry and to amend or withdraw the pleadings as new facts came to light. Compare *Thomas v. Capital Security Serv., Inc.*, 836 F.2d 866 (CA5 1988) (en banc), with *Herron v. Jupiter Transp. Co.*, 858 F.2d 332, 335-336 (CA6 1988). See Burbank, The

> Transformation of American Civil Procedure: The Example of Rule 11, 137 U.Pa.L.Rev.1925, 1930, n.27 (1989). However, I would be unwilling to adopt such a construction of the Rule in a case such as this, where the issue has not been briefed.

Business Guides, 498 U.S. at 570 n.5 (Kennedy dissenting.)

In this case, the Court of Appeals adopted the continuing obligation view. In footnote 1, the Court of Appeals noted:

> [I]t is undisputed that plaintiff's counsel made an extremely thorough investigation. Second, this is a civil rights case, in which counsel obviously thought that a § 1983 action was appropriate to vindicate what appeared to him to be an excessive and unwarranted criminal investigation arising out of a bizarre set of facts. Ordinarily such types of law suits are favored.

(4a). The court then noted, however, that:

> Rule 11 is designed in part to deal with infractions by able, public-spirited but overzealous counsel, and that, when it becomes clear, after litigation is in midstream, that a complaint is not reasonably grounded in the facts, counsel must then "let go."

(4a).

This "let go" obligation contrasts with the obligation of Rule 11 as the Rule was interpreted by the Third Circuit in *Gaiardo v. Ethyl Corp.*, 835 F.2d 479, 484 (3d Cir. 1987). For this reason,

petitioner did not brief, and had no obligation to brief, the factual support he had for the complaint after litigation was in midstream. Had he had an opportunity to do so, the petitioner is confident that he could have shown that there was still adequate support for the complaint. Given the absence of any briefing on this issue, the appellate court's affirmance of the sanctions order must be viewed as nothing more than an affirmance based on an assumption. Given the District Court's demonstrated lack of recollection of the facts of this case, the assumption was at the very least at a highly questionable one.

In any event, without going into further details about the invalidity of the assumption on which the Court of Appeals apparently based its affirmance of the District Court's sanctions Order, it is clear that there is a split in the circuits regarding the presence or absence of a continuing obligation under Rule 11. The split on this important question can and should be resolved by this Court.

CONCLUSION

Supreme Court Rule 10 explains that this Court may grant Certiorari when "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; [or] . . . has decided an important question of federal law that has not been, but should be, settled by this Court. . . ." This case involves both a conflict in decisions by different United States Courts of Appeals and an important question of federal law that should be settled by this Court. For these reasons, petitioner respectfully requests that this Court grant this Petition for a Writ Certiorari.

Respectfully submitted,

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APPENDIX A — ORDER DENYING PETITION FOR REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED JANUARY 3, 1997

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-1134

FRANK H. MORRIS

v.

JAMES ORMAN, PAUL STANLEY, ROBERT KURTZ, WILLIAM SAMMARTINO, CITY OF PHILADELPHIA and UNKNOWN INDIVIDUALS WHO CONSPIRED WITH THE NAMED DEFENDANTS TO DEPRIVE PLAINTIFF OF CONSTITUTIONAL RIGHTS, and JAMES RUSEK

Appellees,

H. FRANCIS DELONE, JR.,

Appellant.

Present: SLOVITER, *Chief Judge,*
BECKER, STAPLETON, MANSMANN, GREENBERG,
SCIRICA, COWEN, NYGAARD, ALITO, ROTH,
LEWIS, MCKEE, *Circuit Judges*
and GARTH, *Senior Circuit Judge**

SUR PETITION FOR REHEARING

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* As to Panel Rehearing Only.

Appendix A

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

s/ TAM
Honorable Theodore A. McKee
Circuit Judge

DATED: JAN 3 1997

JS/cc.: H.F. de L
JPC
WJW
VWG
EBZ
MCL

APPENDIX B — JUDGMENT ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED DECEMBER 4, 1996

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-1134

FRANK H. MORRIS

v.

JAMES ORMAN, PAUL STANLEY, ROBERT KURTZ, WILLIAM SAMMARTINO, CITY OF PHILADELPHIA and UNKNOWN INDIVIDUALS WHO CONSPIRED WITH THE NAMED DEFENDANTS TO DEPRIVE PLAINTIFF OF CONSTITUTIONAL RIGHTS, and JAMES RUSEK

Appellees,

H. FRANCIS DELONE, JR.,

Appellant.

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. 87-cv-05149)
District Judge: Honorable Robert S. Gawthrop, III

Argued
November 7, 1996

Before: BECKER, *Circuit Judge,* McKEE, *Circuit Judge* and GARTH, *Senior Circuit Judge*

Appendix B

DEC 4 1996

JUDGMENT ORDER

After consideration of all contentions raised by the appellant, to wit, that the district court erred (1) in granting sanctions under *Fed. R Civ. Proc.* 11 against the appellant, (2) in granting sanctions in favor of the City of Philadelphia, (3) in sanctioning appellant in an amount that appellant contends exceeded the minimum necessary to deter future misconduct, it is

ADJUDGED AND ORDERED that the order for sanctions entered by the district court on January 16, 1996 are hereby affirmed.[1]

---

1. Judge Becker joins in the judgment, albeit with uneasiness because he believes that the order of sanctions was unwise. Judge Becker particularly notes that the learned District Judge himself acknowledged that the second amended complaint was extremely close to passing muster (*i.e.*, that it was "close to the line"). He also makes two other points. First, plaintiff's counsel did not simply "dash off" this complaint, as is often the case with sanctionable pleadings; indeed, it is undisputed that plaintiff's counsel made an extremely thorough investigation. Second, this is a civil rights case, in which counsel obviously thought that a § 1983 action was appropriate to vindicate what appeared to him to be an excessive and unwarranted criminal investigation arising out of a bizarre set of facts. Ordinarily such types of law suits are favored. However, given the deferential standard of review, Judge Becker cannot write that the district court abused its discretion. He acknowledges in this regard that Rule 11 is designed in part to deal with infractions by able, public-spirited but overzealous counsel, and that, when it becomes clear, after litigation is in midstream, that a complaint is not reasonably grounded in the facts, counsel must then "let go."

Appendix B

Costs taxed against appellant.

BY THE COURT,

s/ [illegible]
Circuit Judge

Attest:

s/ P. Douglas Sisk
P. Douglas Sisk, Clerk

DEC 4 1996

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED JANUARY 19, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 87-5149

FILE JAN 22 1996

FRANK MORRIS

V.

JAMES ORMAN, et al.

ORDER

AND NOW, this 19th day of January, 1996, it is hereby ordered that paragraph 2 of my order of January 12, 1996, is AMENDED to read as follows:

> Attorney's fees and costs are AWARDED, in the amount of $45,898.30 in favor of Paul Stanley, James Rusek, and the City of Philadelphia and against Frank Morris and H. Francis deLeone, Jr., Esquire, jointly and severally.

BY THE COURT:

Appendix C

s/ Robert S. Gawthrop, III
Robert S. Gawthrop, III J.

ENTERED: 1/23 /96

CLERK OF COURT

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED JANUARY 12, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 87-5149

FILE JAN 12 1996

FRANK MORRIS

V.

JAMES ORMAN, et al.

ORDER

AND NOW, this 12th day of January, 1996, it is hereby ordered:

1. Attorney's fees and costs are AWARDED, in the amount of $40,970.95, in favor of defendant Robert Kurtz and against Frank Morris and H. Francis deLeone, Jr., Esquire, jointly and severally;[1] and

---

1. Defendant Kurtz's involvement in the underlying criminal case was limited. John Doe, the victim of plaintiff's molestation, allegedly attacked Mr. Kurtz's son with a knife on the Kurtz property in Philadelphia. The elder Mr. Kurtz reported this alleged attack to the police by way of a criminal complaint.

(Cont'd)

Appendix D

(Cont'd)

In each of the several complaints plaintiff filed in this civil case he alleged that Mr. Kurtz was at the center of a conspiracy designed to convict him. Plaintiff's most specific allegations against Mr. Kurtz were contained in his Second Amended Complaint, in which he alleged that Kurtz:

(1) used his influence to have charges brought against plaintiff;

(2) filed a criminal complaint, which contained false statements, against plaintiff;

(3) caused the release of false publicity regarding plaintiff to the press;

(4) testified falsely at plaintiff's criminal trial; and

(5) persuaded others to testify falsely at plaintiff's criminal trial.

I impose Rule 11 sanctions on plaintiff for two reasons. First, the doctrine of absolute witness immunity barred any claim against Kurtz for giving allegedly perjured testimony. *Briscoe v. Lahue,* 460 U.S. 325, 330-31 (1983) ("immunity of parties and witnesses from subsequent damages liability for their testimony in judicial proceedings [is] . . . well established in English common law."). In 1987, when Judge Shapiro dismissed the original complaint without prejudice, she referred plaintiff to another Supreme Court case that upheld absolute prosecutorial and witness immunity. *Imbler v. Pachtman,* 424 U.S. 409 (1976). In contradistinction the doctrine of absolute immunity does not bar a claim against a private citizen who maliciously and without probable cause files a criminal complaint. *Wyatt v. Cole,* 504 U.S. __, 118 L.Ed. 2d 504 (1992). Plaintiff violated Rule 11(b)(2), because the perjury claim against Mr. Kurtz was not warranted by existing law or an arguable extension of the law.

Second, despite my repeated directives to him, plaintiff provided no factual evidence linking Mr. Kurtz to the alleged conspiracy to convict him. At the June 30, 1993, hearing on sanctions, when cross-examined about the basis of his conspiracy claim, plaintiff's counsel conceded that he had been

(Cont'd)

Appendix D

2. Attorney's fees and costs are AWARDED, in the amount of $45,898.30 in favor of James Orman, Paul Stanley, James Rusek, William Sammartino and the City of Philadelphia and against Frank Morris and H. Francis deLeone, Jr., Esquire, jointly and severally;[2] and

---

(Cont'd)
"talking about suspicion." (Transcript at 70) In violation of Rule 11(b)(3), plaintiff failed to conduct a reasonable inquiry to ascertain facts upon which to support his conspiracy claim against Kurtz.

Plaintiff's improper conduct in this case forced Mr. Kurtz to suffer the emotional and financial burdens of defending against these frivolous claims. While Rule 11(c) was recently amended to replace the mandatory "shall" with the permissive "may," I conclude that plaintiff's conduct nevertheless warrants the imposition of sanctions.

Plaintiff shall be held accountable for $40,970.95 in attorney's fees and costs. This figure represents attorney's fees calculated at defense counsel's reasonable and customary rate of $125. 00 per hour. Mr. Kurtz was fortunate to secure counsel at a below market-rate of $100.00 per hour to defend himself against frivolous claims. I do not reward plaintiff with this windfall.

2. I award Rule 11 sanctions to the detectives, the prosecutor and the City of Philadelphia in this case for substantially the same reasons I award them to Mr. Kurtz. Plaintiff violated Rule 11(b)(2), because the perjury claims against these defendants were not warranted by existing law or an arguable extension of the law. Despite his post-trial efforts to square his case with *Buckley v. Fitzsimmons,* 113 S.Ct. 2606 (1993), plaintiff made allegations of misconduct against each of these defendants that extended well beyond the investigation stage of the underlying criminal case. Each of these defendants, however, had absolute prosecutorial or witness immunity once the criminal action progressed beyond the investigation stage. Plaintiff also violated Rule 11(b)(3), because he failed to conduct a reasonable inquiry to ascertain facts upon which to support his conspiracy claim against these defendants.

Appendix D

3. Thus, my earlier attorneys fee award in this case is, after careful re-deliberation, reaffirmed.

BY THE COURT:

s/ Robert S. Gawthrop, III
Robert S. Gawthrop, III J.

ENTERED 1/16/96

CLERK OF COURT

APPENDIX E — EXCERPTS OF PLAINTIFF'S MEMORANDUM IN OPPOSITION TO MOTION OF DEFENDANT ROBERT KURTZ TO DISMISS PLAINTIFF'S COMPLAINT

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 87-5149

FRANK H. MORRIS
v.

ROBERT KURTZ, ET AL

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO THE MOTION OF DEFENDANT ROBERT KURTZ TO DISMISS PLAINTIFF'S COMPLAINT

BACKGROUND

This is a § 1983 action for damages. The named defendants are two Philadelphia policemen (Orman and Sammartino), the City of Philadelphia, a detective (Stanley) and an attorney (Rusek) for the Office of the District Attorney of Philadelphia, and defendant Kurtz (Complaint ¶¶ 1-7).[1] The allegations in the Complaint include specific descriptions of six police searches of property controlled by plaintiff for which there was no probable cause (Complaint ¶¶ 11-16, 21-33, 36-37); several warrantless seizures of property, for which no probable cause existed, during the course of these searches (*id.*); three arrests of plaintiff for which there was no probable . . . .

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1. A copy of the Complaint, without its exhibits, is attached to this Memorandum as Exhibit A.

See 2A *Moores Federal Practice*, ¶¶ 8.13, 8.14, (2d Ed. 1987). Moreover, an ennumeration of such constitutional provisions would fly in the face of Rule 8(e)(1)'s directive that pleadings be simple, concise, and direct." Kurtz's suggestion, it seems, is simply a result of his confusion over the difference between a need to plead *conduct* violative of constitutional rights versus a purported need for boilerplate asserting that such conduct violated certain constitutional provisions.

IV. Immunity from Liability for Presenting Perjured Testimony Does Not Shield Kurtz from Liability for His Other Violations of Plaintiff's Rights

Although Kurtz describes the scope of its holding too broadly,[2] *Briscoe v. La Hue*, 460 U.S. 325, 103 S.Ct. 1108 (1983) does require the conclusion that Kurtz is immune from liability under § 1983 for his own presentation of perjured testimony at plaintiff's criminal trial. Such immunity, however, does not shield Kurtz from liability for his other acts violative of plaintiff's rights, such as the searches, arrests, and conspiracy to convict plaintiff of a crime through the subornation of perjury described in the Complaint. Thus, Kurtz's immunity from liability for his own presentation of perjury does not justify the dismissal of the Complaint he seeks.

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2. In *Briscoe*, the Supreme Court expressly left open the question of whether a witness may be held liable for presenting perjury at a pre-trial criminal proceeding. 460 U.S. at 329 n.10. Subsequent to *Briscoe*, it has been held that no immunity exists for the presentation of perjured testimony at some pre-trial proceedings. *Wheeler v. Cosden Oil & Chemical Co.*, 734 F.2d 254, 261, *modified in part on other grounds*, 744 F.2d 1131 (5th Cir. 1984).

This immunity also does not mean that plaintiff's allegation of perjury by Kurtz is surplusage or that proof of such perjury would be irrelevant. Kurtz's immunity does not inure to the benefit of his co-conspirators. *See Dennis v. Sparks*, 449 U.S. 24, 101 S.Ct. 183 (1980). Further, proof of such perjury would be probative of the existence of a conspiracy to convict plaintiff of a crime through the subornation of perjury, of Kurtz's participation in such a conspiracy, and of defendant Rusek's knowing use of perjured testimony.

V. Kurtz Fails to Show that Any Necessary Party Has Not Been Joined, Much Less that a Failure to Join an Indispensible Party Requires Dismissal

Kurtz argues that the Complaint should be dismissed because plaintiff did not name as parties to this action John Dean and other witnesses coerced into presenting perjury at plaintiff's trial. He seemingly reasons that such persons are co-conspirators and, therefore, indispensible parties.

There is no reason to believe that such persons are co-conspirators simply because they succumbed to pressure from defendants. Indeed, it is incongruous for Kurtz to argue that such persons should be considered co-conspirators while claiming that his own willing presentation of perjury, his persuasion of . . . .

* * *

Appendix E

CONCLUSION

The allegations in the Complaint sufficiently state a cause of action against Kurtz, and Kurtz's specious arguments provide no justification for denying plaintiff an opportunity to prove these allegations. Kurtz's Motion to Dismiss should, therefore, be denied.

Respectfully submitted,

s/ H. Francis de Lone, Jr.
H. Francis de Lone, Jr.
Attorney for Plaintiff
Frank H. Morris

DATED: October 27, 1987